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Nos. 94-1361, 94-1477

In The

Supreme Court of the United States

October Term, 1994

MARJORIE ZICHERMAN, Individually and as executrix of the estate of Muriel A.M.S. Kole, and MURIEL MAHALEK,

Petitioners/Cross-Respondents,

v.

KOREAN AIR LINES CO., LTD,

Respondent/Cross-Petitioner.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE PETITIONERS/ CROSS-RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Must a surviving parent or sibling prove that they were financially dependent on a decedent in order to recover damages for loss of society under the Warsaw Convention?

2. Does the Death on the High Seas Act prescribe the elements of damages recoverable in an international aviation accident governed by the Warsaw Convention?

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The opinion of the Court of Appeals for the Second Circuit is reported at 43 F.3d 18 (2d Cir. 1994), and is reproduced in the Appendix to the Petition for Writ of Certiorari at A1-A11.

The principal opinion of the District Court is reported at 807 F. Supp. 1073 (S.D.N.Y. 1992), and is reproduced in the Appendix to the Petition for Writ of Certiorari at A12-A42.

Additional opinions of the District Court, not directly related to the issues before this Court, are reported at 146 F.R.D. 61 (S.D.N.Y. 1992) and 814 F. Supp. 605 (S.D.N.Y. 1993).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 5, 1994. The Petition for Writ of Certiorari was filed on February 9, 1995, and was granted as to the first question presented for review on April 17, 1995. A Cross-Petition for Writ of Certiorari was filed on March 6, 1995, and was granted on April 17, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

This case arises under the "Warsaw Convention," known more formally as The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. §1502. The particular treaty provision involved is Article 17:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

This Court's review of the decision below will also involve the Death on the High Seas Act, 46 U.S.C. §761 *et seq.* ("DOHSA"). This statute is reproduced in relevant part in the Appendix to the Respondent's Cross-Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Korean Airlines Flight 007 strayed into Soviet airspace and was shot down on September 1, 1983. All those aboard perished. Among the passengers was Muriel A.M.S. Kole, whose mother, Muriel Mahalek ("Mahalek"), and sister, Marjorie Zicherman ("Zicherman"), are the Petitioners before this Court.

The Petitioners filed suit against Korean Air Lines Co., Ltd. ("KAL") in the Southern District of New York.

Each Petitioner sought recovery in her individual capacity, and Zicherman also sued as the personal representative of her sister's estate (Amended Complaint, reproduced in the Joint Appendix at page 28). Along with all other federal court actions arising out of the KAL tragedy, the Petitioners' case was transferred to the United States District Court for the District of Columbia for consolidated proceedings on the question of liability. *See In re Korean Air Lines Disaster of September 1, 1983*, 575 F. Supp. 342 (J.P.M.D.L. 1983).

On August 2, 1989, following a jury trial, KAL was found liable for "willful misconduct" in connection with the Flight 007 tragedy. Under Article 25 of the Warsaw Convention, KAL therefore could not invoke the $75,000.00 cap on compensatory damages that would otherwise be available. The jury also awarded $50 million in punitive damages against KAL. *See In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1477 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991) ("*Korean Air II*").

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed the finding of willful misconduct, but vacated the award of punitive damages. The District of Columbia Circuit found that the Warsaw Convention was designed to compensate passengers and their survivors for any harm experienced as a result of international aviation accidents, *Korean Air II* at 1485-86, but could not be construed to permit punitive damages. *Id.* at 1485-87. After the decision of the District of Columbia Circuit, the Petitioners' case was remanded to the District Court for a damages trial.

Before a jury was empaneled to assess damages against KAL, the District Court made rulings on the elements of damages recoverable under the Warsaw Convention. The District Court ruled, *inter alia*, that the Petitioners could recover for loss of the decedent's society, and for mental injury they suffered in the aftermath of the tragedy. *See* 807 F. Supp. at 1077-78; 1084-88. The District Court did not require that the Petitioners prove they were financially dependent on the decedent in order to recover damages for loss of society.

On December 11, 1992, after hearing evidence, the jury awarded damages to the Petitioners as follows:

Mahalek	
1. Mental injury	$96,000
2. Loss of society	28,000
Zicherman	
1. Mental injury	$65,000
2. Loss of society	70,000
3. Loss of support	5,000
4. Loss of inheritance	11,000
Zicherman (as executrix)	
1. Decedent's conscious pain and suffering	$100,000

The District Court computed prejudgment interest, and entered final judgment.

KAL noticed an appeal from the District Court's final judgment, contesting all of the damages awarded on both legal and factual grounds. In an opinion dated November 3, 1994, the Second Circuit affirmed the District Court's judgment, with two important exceptions:

1. The Second Circuit ruled that damages for loss of society cannot be recovered under the Warsaw Convention unless the surviving relative was financially dependent on the decedent;

2. The Second Circuit also ruled that damages for mental injury are not recoverable under the Warsaw Convention under any circumstances.

Because the jury had not been instructed that financial dependency was a prerequisite to recovery for loss of society, the Second Circuit examined the record for evidence on the question. It found that Mahalek was, without question, not financially dependent on her daughter, and accordingly vacated all of the damages that Mahalek had been awarded. As to Zicherman, the Second Circuit found some evidence of financial dependency, and therefore remanded the case back to the District Court for a determination on this narrow question. The mental injury award to Zicherman and Mahalek was vacated.

After the Second Circuit issued its November 3 opinion, KAL petitioned for a rehearing. On December 5, 1994, the Second Circuit withdrew its initial opinion, and filed an amended opinion. In the amended opinion, the Second Circuit ruled that the jury's awards for loss of support and loss of inheritance were also subject to a financial dependency requirement. These two awards were therefore vacated, pending further proceedings in the District Court. The Second Circuit then denied KAL's request for a rehearing en banc.

On February 9, 1995, Zicherman and Mahalek filed their Petition for Writ of Certiorari in this Court. The Petitioners sought review of the Second Circuit's decision

on all of the elements of damages that had been vacated. This Court allowed the Petition in part, limiting review to the Second Circuit's decision imposing a financial dependency requirement on loss of society damages. By simultaneously granting KAL's Cross-Petition for a Writ of Certiorari, this Court has also agreed to consider whether DOHSA applies to preclude any recovery for loss of society in the circumstances of the KAL disaster.

SUMMARY OF THE ARGUMENT

Under Article 17 of the Warsaw Convention, KAL is liable for any "damage sustained" in the aftermath of the Flight 007 tragedy. There can be no question that Mahalek and Zicherman have sustained damage of the most acute kind due to Muriel Kole's death, damage that has nothing to do with their financial condition. The plain meaning of the Warsaw Convention therefore supports the District Court's award for loss of society.

Any doubt about the meaning of the phrase "damage sustained" in Article 17 is eliminated when the history and purpose of the Warsaw Convention is examined. The drafters of the Convention understood that loss of society would be recoverable in the event of a passenger's death. Indeed, to deter willful misconduct by air carriers, it is essential that a broad range of compensatory damages be available under Article 17.

Although the Second Circuit misconstrued the phrase "damage sustained" in Article 17, it wisely rejected KAL's claim that DOHSA applies to the facts of this case. The Warsaw Convention contains a broad, substantive rule on

the elements of recoverable damages in the case of international aviation accidents. There is no reason to engraft DOHSA or any other body of law onto Article 17.

Even if this Court were to decide that the Warsaw Convention was silent on the elements of damages recoverable under Article 17, recovery for loss of society should be permitted under well-established federal damages law. Financial dependency should be disregarded, because it is cruel and irrational to suggest that the loss of a loved one is not compensable if the surviving relative happened to work hard and pay her own bills.

ARGUMENT

I. THE WARSAW CONVENTION PERMITS RECOVERY FOR LOSS OF SOCIETY DAMAGES WITHOUT REGARD TO FINANCIAL DEPENDENCY

A. The Text of Article 17 Supports the Award for Loss of Society Made by the District Court

1. The plain meaning of "damage" encompasses loss of society experienced by parents and siblings

Article 17 of the Warsaw Convention sets out an elegantly simple rule on damages. It provides that an air carrier such as KAL "shall be liable for damage sustained in the event of the death or wounding of a passenger . . . " 49 Stat. 3018. To apply this rule to the facts of the case below, the appropriate starting point is the language of the Convention itself, particularly the words "damage sustained." *See generally Santovincenzo v. Egan,*

284 U.S. 30, 40 (1931) (words used in a treaty are to be taken in their ordinary meaning); *Restatement (Third) of the Law of Foreign Relations* §325 (1987); *see also Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (treaties are the supreme law of the land, and their terms override any inconsistent laws).

The ordinary understanding of the term "damage" encompasses loss, detriment or injury. *See III Oxford English Dictionary* 14 (1978 edition); *Black's Law Dictionary* 351 (5th ed. 1979); *Webster's Ninth New Collegiate Dictionary* 323. As an intransitive verb, "damage" suggests "to suffer." *See The American Heritage Dictionary of the English Language* 333 (1973 edition). Nothing about the ordinary meaning of "damage" restricts its usage to financial loss.

Against this background, there is no question that Mahalek and Zicherman sustained "damage" as a result of Muriel Kole's death. The loss and suffering they experienced were profound; there is no more acute sort of damage than the unexpected, tragic loss of a beloved family member. Based on the plain meaning of Article 17, KAL is liable for the loss of society that the Petitioners established in the District Court.

It is regrettable that the Court below recognized loss of society as an element of damages under Article 17, but then elected to restrict recovery to financially dependent survivors. Implicitly, the Second Circuit ruled that loss of a loved one is not "damage" in the absence of financial dependency. This is an absurd result, and it is entirely contrary to the ordinary understanding of the word "damage." Financial dependency has nothing to do with the profound emotional loss experienced with the tragic death of a close relative. The testimony of Mrs. Mahalek

in the District Court illustrates this obvious point: she worked hard her entire life so that she would *not* be financially dependent on her children, but the damage she sustained when her daughter perished was real (JA 76-88). The award made to her, and to Zicherman, should not have been taken away.

2. The French legal meaning of "damage sustained" encompasses loss of society

The Warsaw Convention was drafted in French by continental jurists. As a result, the French legal meaning of the word "damage" ("dommage" in the original French text) is of considerable importance in evaluating the decision below. *See Air France v. Saks*, 470 U.S. 392, 399 (1985), *citing Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). In this case, the French legal meaning of "dommage" coincides with the ordinary English understanding of the term.

In French civil law, there are two categories of damage: "dommage matérial" (pecuniary loss) and "dommage moral" (non-pecuniary losses including emotional distress). *See* Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lésion Corporelle*, 25 Tex. Int'l. L.J. 127, 136 (1990), *citing* Nicholas, *French Law of Contracts*, 221-22 (1982) and DeVries, *Civil Law and The Anglo-American Lawyer* 330 (1975). French law has thus recognized loss of society as a component of "dommage" since well before the turn of the century. Speiser *et al., Recovery for Wrongful Death & Injury*, §3:55 at 256, n. 11 (3d ed. 1992); Miller, *Liability in International Air Transport* 112 (1977), *citing*

Mazeaud, *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle* 416-17 (5th ed. 1957). By using the general term "dommage" rather than the more limited term "dommage matérial," the drafters of the Warsaw Convention expressed an intent to provide for loss of society damages.[1]

The Courts of Appeals for both the District of Columbia Circuit and the Second Circuit have recognized that the French legal meaning of "dommage" encompasses loss of society. *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 37 F.3d 804, 829 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) ("*Lockerbie II*"); *Korean Air II*, 932 F.2d at 1487; *see also Diaz-Lugo v. American Airlines, Inc.*, 686 F. Supp. 373, 376 (D.P.R. 1988) (under Article 17, loss of consortium constitutes "damage sustained"). This Court has explicitly left the question open. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 540 n. 7 (1991). The *Floyd* opinion does recognize, however, that French law provides for recovery of *any* damages that can be proven, including loss of society. *Id.* at 539-40 and n. 7.

Importantly, nothing about the French legal meaning of "dommage" supports the imposition of a financial dependency requirement. *See generally* Speiser *et al.*, *supra* §3:55 at 258, n. 17 (French civil code places no limitations on recovery according to the nature of the damages). It is therefore inconsistent for the Courts of Appeals to recognize the authority of French civil law on the one hand, *see e.g., In re Air Disaster at Lockerbie, Scotland on December 21,*

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[1] The dictionary definition of "dommage" includes "hurt, detriment, loss, harm." *Cassell's French Dictionary* 266 (Macmillan ed. 1982).

1988, 928 F.2d 1267, 1281 (2d Cir. 1991) (*"Lockerbie I"*), but to then impose an irrational financial dependency requirement on the other. Both Mahalek and Zicherman sustained "damage" within the French law meaning of the term.

B. The Structure and Purpose of the Warsaw Convention Preclude Undue Restrictions on Compensatory Damages

1. The Convention contains a cap on damages to protect the economic interests of air carriers

When the Warsaw Convention was drafted in the 1920s, the airline industry was still quite young. One of the purposes of the Convention was to protect the fledgling industry from liability losses that can be a particularly grave threat where air travel is involved. *See* Lowenfeld *et al., The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499 (1967), *citing* remarks of M. Giannini, chairman of the Warsaw Convention working group, in *II Conférence International de Droit Privé Aérien*, 4-12 Octobre 1929, at 135.

The drafters of the Convention had at least two options available to them to limit the aviation industry's liability. First, they could have restricted the damages available under Article 17 to pecuniary loss ("dommage matérial"). Such pecuniary loss wrongful death statutes were in existence in other nations at the time. *See e.g.*, Lord Campbell's Act, 9 & 10 Vict. ch. 93 (England). Second, the drafters could have allowed for unrestricted compensatory damages ("dommage"), subject to a fixed

cap on the monetary amount of damages that could be awarded.

Of course, the drafters of the Warsaw Convention chose the damages cap as the means to protect the economic interest of international air carriers. Warsaw Convention, Article 25, 49 Stat. 3020. This cap currently stands at $75,000.00. *See Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol,* approved by C.A.B. Order No. E-23680, *reprinted at* 49 U.S.C. App. §1592 note (1976). This is the *only* restriction on compensatory damages found in the Warsaw Convention, and it represents a carefully deliberated and negotiated choice among the parties to the treaty.

Today, in the 1990s, a restrictive interpretation of the term "dommage" would be even more inappropriate than it would have been in the 1920s. A liability cap of $75,000.00 per passenger is a tremendous economic advantage for the airline industry under current economic conditions. The damages cap protects air carriers in all cases except for the rare tragedy where willful misconduct has been found. It would be tremendously unfair to rewrite Article 17 by inserting the term "matérial" or any other qualifier after the term "dommage," thereby affording air carriers an unintended double layer of liability protection. *See generally Chan v. Korean Air Lines, Ltd.,* 490 U.S. 122, 135 (1989) (courts must not amend treaties by judicially inserting new clauses or terms), *citing The Amiable Isabella,* 6 Wheat. 1, 71 (1821).

It should be noted that the United States government has repeatedly expressed concerns about restrictions on compensatory damages under the Warsaw Convention

since it entered into force in 1934. In a conference at the Hague in 1955, the chairman of the United States delegation told the delegates that the United States "was interested in maximum recoveries for the injured parties or their survivors." Lowenfeld *et al., supra* at 507. A similar position was expressed at a Montreal conference in 1966. *Id.* at 564; *see also* statement of N.E. Halaby, Administrator, Federal Aviation Agency, in *Hearings on the Hague Protocol to the Warsaw Convention,* United States Senate Committee on Foreign Relations, May 26-27, 1965, pp. 18-19 (U.S. Government Printing Office, 1965). Of course, these concerns were expressed in a different context, namely, the debate over raising the monetary amount of the damages cap under Article 25. Nonetheless, the position taken by the United States after 1934 illustrates the tension created when an industry is afforded the extraordinary protection of a damages cap, tension that the Warsaw Convention addressed by allowing a full range of compensatory "dommage" under Article 17.

2. Full compensatory damages are vital to deter willful misconduct

Under Article 25 of the Warsaw Convention, an air carrier's liability is limited to $75,000.00 per passenger even if the carrier has been negligent or grossly negligent. The cap is lifted only if the carrier has committed willful misconduct. Understandably, the drafters of the Convention wanted to deter egregious mistakes by an airline that are easily preventable. *See generally In re Inflight Explosion on Transworld Airlines, Inc. Aircraft Approaching Athens, Greece on April 2, 1986; Ospina v.*

Transworld Airlines, 778 F. Supp. 625, 631 (E.D.N.Y. 1991) (*"Ospina"*) (deterrence is a generally recognized goal of tort law). The more that compensatory damages under Article 17 are unduly restricted, the less will be the deterrent force of the Warsaw Convention.

The need for full compensatory damages to deter willful misconduct is especially critical because punitive damages are not available under the Warsaw Convention. *See Korean Air II*, 932 F.2d at 1485-86. A full range of compensatory damages is thus the only tool available to maximize the deterrent value of the Convention. Indeed, in disallowing punitive damages, the Second Circuit in *Lockerbie I* relied in part on the full range of compensatory damages available under French law:

> There is nothing in French law prohibiting compensation for any particular kind of damage, be it mental injury, suffering due to the death of a member of the family, or pain and suffering due to a physical injury. Provided the damage is *certain* and *direct*, all forms of damage can be compensated to their full extent.

932 F.2d at 1487, *citing* Miller, *Liability in International Air Transport* 112 (1977) (emphasis in original). Thus, the unavailability of punitive damages must be balanced by a full range of compensatory damages in order for the deterrent effect of the Warsaw Convention to work.

II. THE DISTRICT COURT'S AWARD FOR LOSS OF SOCIETY UNDER THE WARSAW CONVENTION IS CONSISTENT WITH FEDERAL AND STATE DAMAGE LAW

A. The Death on the High Seas Act Does Not Apply to the Facts of This Case

1. Article 17 of the Warsaw Convention is not an empty vessel

Throughout this litigation, KAL has taken the position that the words "damage sustained" in Article 17 of the Warsaw Convention have no substantive content. In other words, KAL believes that Article 17 is silent on the elements that make up "dommage," and that the Convention therefore expressly defers to the internal law of each contracting state to determine the precise elements of recoverable damages.

To support its position, KAL relies primarily on Article 24 of the Convention. This Article provides:

Article 24

> 1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> 2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020. Contrary to KAL's position, the last clause of this Article refers only to procedural questions, not

substantive ones. In particular, this provision defers to local law on the issue of who has standing to sue. Lowenfeld *et al., supra* at 517. By referring to the "respective" rights of potential plaintiffs, the Article also defers to local law on the issue of dividing up the proceeds of a recovery under Article 17.

It is easy to understand why the drafters of the Warsaw Convention did not want to tackle procedural questions such as standing to sue. Even among the 50 states, wrongful death statutes employ a variety of procedural schemes to enforce the rights of survivors, and to divide up proceeds; similar differences exist between nations. It would have been a monumental task to reconcile these diverse procedures in an international convention.

Importantly, however, Article 24 does *not* say that the substantive elements of damages recoverable under Article 17 are left open. The term "dommage" has its own substantive content by virtue of its ordinary meaning, and its French legal meaning. As discussed above, "dommage" means any loss or injury sustained, be it pecuniary or emotional. No reference to local law is required to effectuate Article 17.

It must be remembered that uniformity among nations was a central goal of the Warsaw Convention, along with the desire to promote the aviation industry. Lowenfeld *et al., supra* at 498; *see also Trans World Airlines Inc. v Franklin Mint Corp.*, 466 U.S. 243, 256 (1984) (Convention's framers sought to include international, not parochial, rules of substantive law, free from the control of any one country). Obviously, deferring to local law to

determine the elements of damages recoverable under Article 17 would frustrate this purpose, and subject air carriers to a bewildering array of substantive damage law.[2] This is why Article 17 uses a term, "dommage," that has its own substantive content.

2. The Death on the High Seas Act would be a poor filler even if Article 17 was an empty vessel

DOHSA was enacted in 1920, fourteen years before the Warsaw Convention became effective in the United States, and seven years before Charles Lindbergh crossed the Atlantic. It applied to deaths "caused by wrongful act, neglect, or default occurring on the high seas . . . " 46 U.S.C. §761. International commercial aviation was almost unknown at the time, and Congress certainly did not consider the effect that DOHSA might have on aviation accidents when it was debated and enacted.

Of course, DOHSA has been broadly construed since its enactment. Aviation deaths from domestic flights occurring on the high seas have been held to be subject to its provisions, despite the fact that aviation is only marginally related to traditional maritime activity. *See Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 270-71 and n. 20 (1972). However, DOHSA has never been applied by this court to an *international* aviation accident

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[2] By contrast, deferring to local procedural law is much less onerous. The total exposure faced by air carriers in the aftermath of an aviation accident is unaffected by differences in procedure such as the proper parties to bring suit, and the respective rights of claimants.

that is directly governed by the Warsaw Convention, and most lower courts have refused to engraft DOHSA onto Article 17 of the Convention. *See Lockerbie II*, 37 F.3d at 829; *In re Korean Air Lines Disaster of September 1, 1983; Bowden v. Korean Air Lines Co., Ltd.*, 814 F. Supp. 592, 597-98 (E.D. Mich. 1993); *Ospina*, 778 F. Supp. at 636 (noting that DOHSA does not apply to preclude a survival cause of action under the Warsaw Convention); *In re Air Crash Disaster Near Honolulu, Hawaii, on February 24, 1989*, 783 F. Supp. 1261, 1265 (N.D. Cal. 1992) (DOHSA might govern the pecuniary loss components of a Warsaw Convention case, but DOHSA does not *limit* the types of damages recoverable under Article 17).

There are two good reasons for the lower courts' reluctance to rewrite Article 17 by inserting the provisions of DOHSA. First, DOHSA cannot possibly apply where an international flight crashes over land, or over territorial waters. *See* 46 U.S.C. §761. In such a case, courts would have to find some other body of law to determine the damages recoverable under Article 17. Such inconsistency, an arbitrary function of geography, is anathema to the Warsaw Convention's goal of uniformity, as the Second Circuit recognized in its decision below. 43 F.3d at 21, *citing Lockerbie I*, 928 F.2d at 1278-79.

The second reason to reject KAL's position is that DOHSA is a very restrictive statute. It allows for pecuniary damages only, such that in many instances there is no recovery at all in the case of wrongful death. As discussed above, such undue restrictions on compensatory damages are unwarranted when the Warsaw Convention applies, because the liability exposure of air carriers is *already* greatly restricted by the damages cap of Article

25. The Court below also hinted at this fundamental conflict:

> We cannot reconcile DOHSA's limitation of damages to pecuniary loss with the "aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention."

43 F.3d at 22, *citing Lockerbie II*. This rationale is all the more compelling in light of the $75,000.00 cap that protects air carriers in most instances. DOHSA has no place in the Warsaw Convention's unique and comprehensive scheme for regulating international air transportation.

B. Federal Common Law Supports the Loss of Society Awards Made in the District Court

The Second Circuit elected to look beyond the plain meaning of "damage sustained," and relied on federal common law to determine the elements of damages recoverable under the Warsaw Convention. This approach is unnecessary, because the loss of Muriel Kole's society was, without question, "damage sustained" in every sense of that phrase. However, the judgment of the District Court should have been affirmed even under federal common law.

1. Loss of society is a well-established feature of federal damages law

Damages for loss of society are available under federal common law. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 583 (1974) (federal common law allows recovery

for loss of society for death of longshoreman in territorial waters); *see also Berry v. City of Muskogee, Oklahoma*, 900 F.2d 1489, 1507 (10th Cir. 1990) (decided under 42 U.S.C. §1983 and federal common law of torts); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1251-53 (7th Cir. 1984) (same).[3] This Court has recognized the "grave harm" caused to survivors when they are deprived of the "broad range of mutual benefits *each family member* receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and protection." *Gaudet*, 414 U.S. at 585 (emphasis added). In its opinion below, the Second Circuit correctly noted that loss of society is a recognized remedy under federal common law.

In fashioning federal common law, courts can and should look to state law as one source of guidance. *Gaudet*, 414 U.S. at 587. The majority of the fifty states permit recovery for loss of society in cases of wrongful death. 3 Minzer *et al., Damages in Tort Actions*, §22.43 [1][a](1991); Speiser, *supra* at §3.50. The most compelling rationale for this majority rule is that "[t]he destruction of the intangible elements of a family relationship, including love, comfort, and companionship, is generally an inherent and real consequence of the wrongful death of a parent, child, spouse or sibling." 3 Minzer, *supra* at §22.43[1][a], *citing Elliott v. Willis*, 89 Ill. App. 3d 1144, 412

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[3] Federal common law has been developed in only limited areas, particularly admiralty and civil rights. *See Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 626 n. 5 (3d Cir. 1994).

N.E.2d 638 (1980), *also citing* cases from other jurisdictions permitting siblings and parents to recover for loss of society.

It is true that, where DOHSA applies, loss of society is not available under federal law. *See, e.g., Mobil Oil Corp. v. Higgenbotham*, 436 U.S. 618, 623-24 (1978). Similarly, for a Jones Act case involving the death of a seaman, loss of society is unavailable; the Jones Act, like DOHSA, limits recovery to pecuniary damages. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32-33 (1990). Neither *Miles* nor *Higgenbotham* is applicable here, however, because this is a Warsaw Convention case outside the reach of both DOHSA and the Jones Act. *See generally American Export Lines, Inc. v. Alvez*, 447 U.S. 274, 281-82 (1980) (reaffirming that loss of society is available under federal common law where DOHSA and the Jones Act are not directly applicable).[4]

In the past, this Court and some lower courts have expressed concern that *Gaudet* strayed too far from a perceived congressional scheme to regulate maritime wrongful death cases. *See, e.g., Calhoun*, 40 F.3d at 636 (*Gaudet* may represent the apex of plaintiff's rights in admiralty actions). However, decisions limiting the reach of *Gaudet* are based entirely on the proposition that two 1920 statutes – DOHSA and the Jones Act – express a congressional intent to limit recovery to pecuniary losses for maritime deaths. *Miles*, 498 U.S. at 24. This proposition is untrue in a Warsaw Convention case; the Convention entered into force as a comprehensive treaty 14 years

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[4] The *Alvez* decision noted that DOHSA and the Jones Act were hastily enacted, and should not unduly influence the development of federal common law. 446 U.S. at 283.

after DOHSA and the Jones Act were enacted. Those two statutes therefore have nothing to say about a Warsaw Convention case, and the common law principles announced in *Gaudet* should retain their vitality where the Warsaw Convention is concerned.

2. Parents and siblings may recover for loss of society under federal common law without a showing of financial dependency

Federal damages law, when not constrained by specific statutes, has always provided full compensation for injuries. *See, e.g., Moragne v. States Marine Lines,* 398 U.S. 375, 387 (1970) ("it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules"). This is especially true where, as in this case, deterrence is a central goal of the liability system. *See Berry,* 900 F.2d at 1507 (federal remedy must make available sufficient damages to serve the deterrent function central to the purpose of 42 U.S.C. §1983). By limiting loss of society damages to financially dependent relatives, the decision below ran afoul of this general principal.

In *Sutton v. Earles,* 26 F.3d 903 (9th Cir. 1994), the Court of Appeals upheld an award for loss of society to non-dependent parents. The Ninth Circuit found nothing in *Gaudet* that would require a financial dependency test, and thus rejected such a test as "unnecessary distinction." 26 F.3d at 917. As the Ninth Circuit observed, even those courts that have imposed a financial dependency requirement have questioned its logic. *Id.* at 917, n. 18, *citing*

Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084, 1092 (2d Cir. 1993).

For cases such as this one, where *Gaudet* still retains vitality, this Court should adopt the Ninth Circuit's view on financial dependency. The crass limitation on loss of society damages imposed by the opinion below sends a terrible message about the law to society at large. How seriously can the public take a legal system that denied recovery to Mrs. Mahalek because she worked her entire life to support herself, but would have rewarded her if she had received monthly checks from her daughter? On this point, the Second Circuit's sheepish statement that "no doubt this rule denies recovery to some deserving parties," 43 F.3d at 22, is an awful understatement.

To overcome the illogic and cruelty of a financial dependency requirement, the Second Circuit relied entirely upon the following proposition:

> . . . the inherent concerns of vagueness and uncertainty "necessitate[ ] that we draw a line between those who may recover for loss of society and those who may not."

43 F.3d at 22, *Citing Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989). It may be true that a line needs to be drawn; the Court below offered no real support for this assertion, empirical or otherwise. If true, however, the line drawn by the District Court, permitting "close family members" to recover for loss of society, at least has some rational basis. Loss of society generally tends to be less acute among more distant relatives of a decedent; it is not a perfect correlation, but it is vastly superior to financial dependency as a test of lost companionship.

This Court has an opportunity to reaffirm that federal common law is logical and sensible. By adopting *Sutton*, and rejecting the financial dependency test espoused by other circuits, this Court can make it clear that hard work and financial self-sufficiency will not result in a loss of legal rights.

CONCLUSION

Mahalek and Zicherman both sustained damage due to KAL's willful misconduct. They lost the love and companionship of Muriel Kole, and the District Court properly compensated them for this damage. The judgment of the Court of Appeals should be vacated, and the judgment of the District Court awarding damages for loss of society should be affirmed.

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